APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1476

J. W. BATESON COMPANY, INC., ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR CERTIORARI FILED APRIL 25, 1977
CERTIORARI GRANTED JUNE 27, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1476

J. W. BATESON COMPANY, INC., ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

INDEX

	Page
Relevant District Court docket entries	1
Court of Appeals docket entries	3
Complaint (with extracts from Exhibits 1, 2, and 3)	5
Defendant's motion to dismiss	19
Order of District Court denying Defendant's motion to dismiss dated, July 3, 1974	20
Defendant's motion to reconsider	21
Plaintiff's request No. 1 for production of documents	22
Order of District Court denying Defendant's motion to reconsider, dated July 26, 1974	24
Defendants' answer	25
Plaintiffs' request for admissions of fact	28
Defendants' response to Plaintiffs' request for admissions of fact	32
Plaintiffs' request for admissions as to the genuineness of certain documents	33

	Page
Defendants' motion for summary judgment	35
Affidavit of Lewis L. Pierce, dated January 10, 1975	36
Defendants' statement of material facts	38
Plaintiffs' cross-motion for summary judgment	42
Affidavit of Glenn V. Whitaker, dated March 24, 1975	43
Affidavit of Joseph Hajkowski, dated March 21, 1975	44
Plaintiffs' statement of material facts	51
Order of District Court denying Defendants' motion for summary judgment and granting Plaintiffs' cross-motion for summary judgment, dated June 6, 1975	57
Notice of appeal by Defendants	58
Plaintiffs' motion to dismiss appeal	59
Order of Court of Appeals granting Plaintiffs' motion to dismiss appeal, dated October 24, 1975	60
Motion to certify for appeal	61
Order certifying for appeal, dated October 29, 1975	62
Notice of appeal by Defendants	63
Judgment of Court of Appeals affirming judgment of District Court, dated January 28, 1977	64
Order of Court of Appeals denying Plaintiffs' petition for rehearing, dated February 16, 1977	66
Order of Court of Appeals denying suggestion for rehearing *en banc*, dated February 16, 1977	66
Order allowing certiorari, dated June 27, 1977	68

RELEVANT DISTRICT COURT DOCKET ENTRIES

Date	Civil Docket
1974	
May 23	Motion by defts. to dismiss; P&A's; c/m 5-20-74. Appearance of Henry J. Cappello.
June 13	Response of plts. to defts' motion to dismiss; c/m 6-11-74.
June 18	Reply by defts to pltfs' response to defts' motion to dismiss; c/m 6-14-74.
Jul 3	Order denying deft's motion to dismiss (N) Robinson, J.
Jul 15	Motion of defts. to reconsider defts' motion to dismiss, or in alternative to certify decision for interlocutory appeal; P&A, c/m 7-11-74.
Jul 15	Request No. 1 by pltfs. for production of documents; c/m 7-12-74.
Jul 23	Response of pltfs' to defts' motion to reconsider the motion to dismiss the alternative, to certify the Court's order for an interlocutory; c/m 7-22-74.
Jul 26	Order denying motion to reconsider defts' motion to dismiss; denying motion to certify Court's order of 7-3-74 for appeal pursuant to 28 U.S.C. 1292(b). (N) Robinson, J.
Aug 5	Answer of defts. to complaint; c/m 8-2-74.
Nov 1	Request by pltff. for admissions of fact; c/m 10-30-74.
Nov 20	Response by defts. to pltfs. request for admissions of fact; c/m 11-19-74.
Dec 17	Request by pltff. for admissions as to the genuineness of certain documents; attachments (26); c/m 12-16-74.
1975	
Feb 18	Motion of deft for summary judgment; memorandum; affidavit of Lewis L. Pierce; statement; request for oral argument; c/m 2-13-75.

1975

Mar 24—Cross-Motion by pltff for summary judgment; memorandum; affidavit of Glenn V. Whitaker with attachment; affidavit of Joseph Hajkowski; table of cases; statement; c/m 3-23-75.

Apr 7—Memorandum by defts in opposition to pltffs' cross-motion for summary judgment; c/m 4-4-75.

Apr 17—Response of pltff to memorandum of deft. in opposition to cross-motion for summary judgment; c/m 4-16-75.

June 6—Order denying defts' motion for summary judgment; granting pltffs' cross-motion for summary judgment. (N) Robinson, J.

July 1—Notice of Appeal by defts. from Order of June 6, 1975. $5.00 paid and credited to U.S. Copy mailed to Glenn V. Whitaker.

Oct 23—Motion of defts to certify for appeal pursuant to 28 U.S.C. 1291-1292; P&As; approved by counsel for pltft.

Oct 29—Order certifying determination of Court granting summary judgment to pltff to U.S. Court of appeals pursuant to 28 U.S.C. Sec. 1291-1292; staying proceedings pending determination of said appeal.

Nov 4—Notice of Appeal by J. W. Bateson Co., Inc. and Centex Corp. from Order entered June 6, 1975 and pursuant to 28 U.S.C. 1291-1292. Copy mailed to Glen V. Whitaker. $5.00 paid and credited to U.S.

1977

Feb 23—Certified copy of Judgment from USCA affirming judgment from the USDC in accordance with the opinion of this Court; Bill of Costs as taxed by Clerk of Court of Appeals; Opinion attached.

COURT OF APPEALS DOCKET ENTRIES

Notice of Appeal Filed: November 4, 1975

12-10-75—Certified Original Record (no transcripts) (n-2)

1-12-76—4-Appellants' motion to adopt brief previously submitted in Case No. 75-1761 (m-30).

1-12-76—4-Appellants' motion to permit filing of additional copies of record in lieu of joint appendix (m-9).

1-14-76—Clerk's order granting appellants' motion to adopt brief previously submitted in Case #75-1761 and counsel is granted leave to withdraw the brief previously filed in #75-1761 and, after making the appropriate changes to conform to the caption and to comply with any recently amended rules of this Court, file it as appellants' brief herein; the time for filing appellees' brief is extended to February 13, 1976.

1-15-76—15-Appellants' brief (p-15).

1-19-76—Order per CJ Bazelon that counsel for appellants is granted leave to file 7 copies of the relevant portions of the record, in xerox form in lieu of printed a joint appendix.

1-19-76—7-Copy of record in lieu of appendix (p-15).

2-2-76—4-Appellee's (Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, et al.) motion to extend time to file brief to March 5th (m-2).

2-5-76—Clerk's order granting appellees' (Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, et al.) motion to extend time to file brief to March 5, 1976.

3-5-76—25-Appellees' Brief (p-5).

3-11-76—15-Appellants' reply brief. (m-10).

3-17-76—Clerk's order sue sponte, placing this case on the summary calendar.

12-9-76—Argued before Wright and Robb, CJ and Gerhard A. Gesell, U.S. District Judge for the U.S. District Court for the District of Columbia sitting by designation.

1-28-77—Opinion for the Court filed by District Judge Gesell.

1-28-77—Concurring opinion filed by Circuit Judge Wright.

2-4-77—11-Appellants' petition for rehearing, or, in the alternative for hearing en banc (m-4).

2-11-77—1-Bill of Costs filed by Appellees (m-11).

2-16-77—Per Curiam order denying appellants' petition for rehearing. Wright and Robb, CJ and Gesell, U.S. District Judge for the U.S. District Court for the District of Columbia, sitting by designation.

2-16-77—Per Curiam order en banc that appellants' suggestion for rehearing en banc is denied; CJ Bazelon; Wright, McGowan, Tamm, Leventhal, Robinson, Mackinnon, Robb and Wilkey, CJ.

2-16-77—Information copy of the above orders sent to Clerk, U.S. District Court and a copy sent to Judge Robinson.

2-22-77—Certified copy of judgment, and a copy of opinion and bill of costs in the amount of $127.92 issued to District Court.

5-2-77—Notice of filing of a petition for writ of certiorari in S.C. No. 76-1476 on April 25, 1977.

6-7-77—Receipt dated 5-19-77 for original record.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-699

UNITED STATES OF AMERICA for and on behalf of the BOARDS OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY WELFARE FUND, AND THE NATIONAL AUTOMATIC SPRINKLER LOCAL 669, U.A. EDUCATIONAL FUND, consisting of: JOSEPH HAJKOWSKI, THOMAS W. HANNA, THOMAS J. DEVLIN, CLYDE C. CLEARE, KENNETH G. HOLLAWAY, RAYMOND J. CASEY, RICHARD D. SULLIVAN, MAURICE D. BERNIER, 6135 Kansas Avenue, N.E., Washington, D.C. 20011

and

ROAD SPRINKLER FITTERS LOCAL UNION No. 669, U.A., 7411 Riggs Road, Adelphi, Maryland 30783,

Plaintiffs,

v.

J. W. BATESON COMPANY, INC., and CENTEX CORPORATION, a Joint Venture, d.b.a. J. W. BATESON COMPANY, 10150 Monroe Drive, P.O. Box 20677, Dallas, Texas 75220

and

THE AETNA CASUALTY AND SURETY COMPANY, Hartford, Connecticut 06115

and

AMERICAN RE-INSURANCE COMPANY, 99 John Street, New York, New York 10038

and

EMPLOYERS RE-INSURANCE CORPORATION, Kansas City, Missouri 64142

and

GENERAL REINSURANCE CORPORATION, 400 Park Avenue,
New York, New York 10022

and

THE HOME INSURANCE COMPANY, New York, New York,
Defendants

Complaint

Comes now the Plaintiffs, by and through their attorneys and allege:

1. That jurisdiction of this cause is conferred by Title 40 of the United States Code, Sections 270a and 270b, as amended.

2. That the National Automatic Sprinkler Industry Pension Fund, the National Automatic Sprinkler Industry Welfare Fund and the National Automatic Sprinkler Local 669, U.A. Educational Fund (hereinafter "Local 669 Funds"), are employee fringe benefit funds established for the benefit of employees represented by Road Sprinkler Fitters Local Union No. 669 U.A. (hereinafter "Local 669") pursuant to Articles XIX, XX and XXI of the collective bargaining agreement between Colquitt Sprinkler Company, Inc. (hereinafter "Colquitt") and Local 669, a copy of the agreement is attached as Exhibits 1 and 2.

3. That Local 669 is an unincorporated labor organization representing sprinkler fitters employed by Colquitt throughout the United States.

4. That Defendant J. W. Bateson Company (hereinafter "Contractor") is a joint venture consisting of J. W. Bateson Company, Inc. and Centex Corporation, transacting business in the District of Columbia and contracting to supply services in the District of Columbia at all times pertinent as herein alleged.

5. That Defendant Aetna Casualty and Surety Company (hereinafter "Surety") is a corporation contracting

to insure or act as surety for a risk, contract, obligation or agreement located, executed or to be performed in the District of Columbia.

6. That Defendant American Re-Insurance Company (hereinafter "Surety") is a corporation contracting to insure or act as surety for a risk, contract, obligation or agreement located, executed or to be performed in the District of Columbia.

7. That Defendant Employers Re-Insurance Corporation (hereinafter "Surety") is a corporation contracting to insure or act as surety for a risk, contract, obligation or agreement located, executed or to be performed in the District of Columbia.

8. That Defendant General Reinsurance Corporation (hereinafter "Surety") is a corporation contracting to insure or act as surety for a risk, contract, obligation or agreement located, executed or to be performed in the District of Columbia.

9. That Defendant Home Insurance Company (hereinafter "Surety") is a corporation contracting to insure or act as surety for a risk, contract, obligation or agreement located, executed or to be performed in the District of Columbia.

10. That on August 10, 1971, Defendant Contractor entered into a written contract with the United States of America, Plaintiff, acting by and through the General Services Administration for the construction of an addition to the Howard University Hospital, being Contract No. G5-03-B-15676, for the principal sum of $39,015,272.20.

11. That on August 12, 1971, Defendant Contractor, along with Defendant Sureties, duly executed and delivered to the United States Government a payment bond for the protection of all persons supplying labor and materials in the prosecution of the work provided for in Contract No.

G5-03-B-15676; that the bond was duly executed in accordance with the provisions of Title 40 of the United States Code, Section 270a in the sum of $2,500,000.00. A copy of the bond is attached as Exhibit 3.

12. That Colquitt is a subcontractor engaged by a subcontractor of the Defendant Contractor, and that between the dates May 1, 1973 and December 1, 1973, members of Local 669, at the special instance and request of Colquitt, performed 4749 hours of labor in the prosecution of the work provided for in the principal contract between the Plaintiff and the Contractor; that pursuant to Articles XIX, XX and XXI of its collective bargaining agreement with Local 669, Colquitt was required to pay into the Local 669 Funds certain specified sums of money for each hour worked by employees of Colquitt at Colquitt's request who were represented by Local 669; that pursuant to Article XXIV of the collective bargaining agreement with Local 669, Colquitt was required to withhold from the wages of its employees represented by Local 669 the sum of 50¢ for each hour worked by its employees and submit this withheld money to a Vacation Fund maintained by the Riggs National Bank; that pursuant to Article IV of the collective bargaining agreement with Local 669, Colquitt was required to withhold union membership dues from the wages of its employees represented by Local 669 who executed "Authorization for Check-Off of Work Assessment" forms, and remit these withheld monies to Local 669; that none of the monies referred to above have been paid by Colquitt to the respective funds and Local 669; that the total amount due is $8,021.78.

13. That on or about December 1, 1973, was the date on which the members of Local 669 employed by Colquitt performed the last of the labor at Colquitt's request.

14. That on or about December 10, 1973, Plaintiffs, pursuant to Title 40 of the United States Code, Section

270b, served written notice upon Defendant Contractor of their claim for the amount owed resulting from labor performed in the prosecution of the work provided for in the primary contract; that said notice was duly served by registered mail in the manner provided for in Title 40 of the United States Code, Section 270b, accurately stated the amount claimed and the name of the party to whom the labor was supplied, and otherwise complied with the provisions of the aforesaid statute.

WHEREFORE, Plaintiffs pray judgment in the amount of $8,021.78, plus costs, interest and attorneys' fees.

Respectfully submitted,

O'DONOGHUE & O'DONOGHUE

/s/ By: DONALD J. CAPUANO
Donald J. Capuano

/s/ GLEN V. WHITAKER
Glenn V. Whitaker
1912 Sunderland Place, N.W.
Washington, D.C. 20036
Attorneys for Plaintiffs
785-2237

EXHIBITS 1 AND 2 TO COMPLAINT

• • • •

AGREEMENT BETWEEN

NATIONAL AUTOMATIC SPRINKLER AND FIRE CONTROL ASSOCIATION, INC.

AND

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.

COVERING

RULES, REGULATIONS AND WORKING CONDITIONS
APPRENTICESHIP STANDARDS

April 1, 1973

• • • •

ARTICLE 4

DUES CHECK-OFF: The employer agrees to deduct Union Membership Dues lawfully and uniformly levied by the Union in accordance with the Constitution and By-Laws of the Union from the pay of each employee who executes or has executed the following "Authorization for Check-Off of Work Assessment" form. Such deductions shall be computed and deducted weekly and remitted to Local Union 669 monthly, not later than the 15th day of each month following the month in which the wages were paid.

• • • •

ARTICLE 19

NATIONAL AUTOMATIC SPRINKLER INDUSTRY WELFARE FUND: It is mutually agreed that a Welfare Fund on a National Automatic Sprinkler Industry basis has been established for those employees who are covered by this Collective Bargaining Agreement.

There has been created a Board of Trustees of six (6) members, three (3) appointed by the National Automatic

Sprinkler and Fire Control Association, Inc. and three (3) Union Trustees, two (2) appointed in accordance with Local Union 669's Constitution and By-Laws and one (1) appointed in accordance with the National Automatic Sprinkler Industry Welfare Fund Trust Agreement.

The Board of Trustees shall administer the existing Agreement and Declaration of Trust in accordance with Federal, State and local laws and shall continue to take all necessary steps to carry out the legal operation of this Welfare Fund.

Effective April 1, 1973, each contractor shall pay to the Fund Forty Cents ($.40) per hour for all hours worked by all employees who come under the jurisdiction of this Collective Bargaining Agreement.

Effective April 1, 1974, each contractor shall pay to the Fund Fifty Cents ($.50) per hour for all hours worked by all employees who come under the jurisdiction of this Collective Bargaining Agreement.

ARTICLE 20

NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND: It is mutually agreed that a Pension Fund on a National Automatic Sprinkler Industry basis has been established for those employees who are covered by this Collective Bargaining Agreement.

There has been created a Board of Trustees of six (6) members, three (3) appointed by the National Automatic Sprinkler and Fire Control Association, Inc. and three (3) Union Trustees, two (2) appointed in accordance with Local Union 669 Constitution and By-Laws and one (1) appointed in accordance with the National Automatic Sprinkler Industry Pension Fund Trust Agreement.

The Board of Trustees shall administer the existing Agreement and Declaration of Trust in accordance with Federal, State and local laws and shall continue to take all

necessary steps to carry out the legal operation of this Pension Fund.

Effective April 1, 1973, each contractor shall pay to the Fund Sixty Cents ($.60) per hour for all hours worked by all employees who come under the jurisdiction of this Collective Bargaining Agreement.

Effective April 1, 1974, each contractor shall pay to the Fund Seventy Cents ($.70) per hour for all hours worked by the employees who come under the jurisdiction of this Collective Bargaining Agreement.

ARTICLE 21

NASA—LOCAL 669 INDUSTRY EDUCATION FUND: It is mutually agreed that an Apprenticeship System has been established for the purpose of providing Educational Training as provided by the Apprenticeship Standards.

An Educational Trust Fund has been established. There has been created a Board of Trustees consisting of six (6) members: three (3) appointed by the National Automatic Sprinkler and Fire Control Association, Inc. and three (3) Union Trustees appointed in accordance with the Constitution and By-Laws of the Local Union 669.

The duty of this Board of Trustees shall be to administer the existing Agreement and Declaration of Trust in accordance with Federal, State and local laws and to take all necessary steps to carry out the legal operation of the above agreed Educational Fund. Effective April 1, 1973, each contractor shall pay to the Fund Seven Cents ($.07) per hour for all hours worked by all employees whose wages are covered by this Collective Bargaining Agreement.

Effective April 1, 1974, each contractor shall pay to the Fund Eight Cents ($.08) per hour for all hours worked by all employees whose wages are covered by this Collective Bargaining Agreement.

ARTICLE 22

MONTHLY REPORTS: Employers party to this Agreement shall submit contributions to the Welfare, Pension and Educational Funds in accordance with rules, regulations and procedures established by the Trustees of the Welfare, Pension and Educational Funds.

The Employer agrees that the Trustees of the Welfare Trust, the Pension Trust and the Educational Trust, or their designees, shall have the authority to order an audit of the payroll, wage and related records (including supporting work sheets) of the Employer for the purpose of insuring compliance with the terms of this Agreement requiring contributions to the Trust Funds.

The Employer agrees that in the event the Trustees institute or participate in legal proceedings to collect payments or contributions from an Employer, the Employer shall also be required to pay reasonable attorney's fees, expenses of collection and interest at the highest rate permitted by the laws of the State where the legal proceeding is instituted.

Each contractor who is a subscriber to this Agreement or who desires to become a subscriber to this Agreement shall furnish to the Union a cash or surety bond in an amount not less than Five Thousand Dollars ($5,000.00) to guarantee contributions for Welfare, Pension, Educational, Vacation and Dues payments in the manner and in the amount required by this Agreement.

• • • •

ARTICLE 24

VACATION SAVINGS PLAN: The purpose of vacations is to provide rest and relaxation for sprinkler fitters and/or apprentices and to encourage the sprinkler fitter and/or apprentice to remain in the sprinkler industry.

There is established a Vacation Plan for the employees covered by this Collective Bargaining Agreement on a basis of each hour worked. The Employer shall withhold from the "NET WAGES" of each employee covered by this Collective Bargaining Agreement Fifty Cents ($.50) for each hour worked on and after April 1, 1973.

• • • •

AGREEMENT

THIS AGREEMENT made this 7th day of April, 1973, by and between the Road Sprinkler Fitters Local Union 669 (hereinafter called "Union") and .... (hereinafter called "Employer").

• • • •

WHEREAS, the said Employer is desirous of hiring and employing journeymen sprinkler fitters and apprentices; and

WHEREAS, the Union has competent and skilled journeymen and apprentice sprinkler fitters;

NOW, THEREFORE, it is mutually agreed as follows:

(1) That the Employer and the Union mutually agree to be bound by the terms and conditions of the Agreement between the National Automatic Sprinkler and Fire Control Association, Inc. and the United Automatic Sprinkler Fitters and Apprentices Local Union 669, dated the 30th day of March 1973 and effective April 1st, 1973 and all addendums and supplements thereto, copy of which are hereto attached and made a part hereof, the same as if the Employer and the Union were parties thereto; and the Employer and the Union herewith adopt said Agreement as and for their contract of employment and that all the journeymen sprinkler fitters and their apprentices hired by the Employer are to be employed according to the terms and conditions of employment contained in said Agreement.

(2) The Employer and Union do further agree to be bound by the Declarations and Trust establishing a Local Union 669 Health and Welfare Fund and separate Education Fund made between the National Automatic Sprinkler and Fire Control Association, Inc. and the United Automatic Sprinkler Fitters and Apprentices Local Union 669—dated the 2nd day of April, 1953 and separate Pension Fund dated the 1st day of April, 1957, and the Employer agrees to be bound thereby and by all amendments made thereto the same as if the Employer and the Union were parties to said Declaration of Trust.

(3) The Employer further agrees to make the necessary financial contributions to the Local Union 669 Health and Welfare Fund and Education Fund and Pension Fund as required by the collective bargaining agreement effective April 1st, 1967 and the said Declarations of Trust. The Employer hereby authorizes the parties to name Trustees and successor Trustees to administer the Health and Welfare Trust Fund and Education Trust Fund and Pension Trust Fund, and hereby ratifies and accepts such Trustees and the terms and conditions of the Trust as if fully made by the Employer and Union together.

WITNESS our hands and seals this 7th day of April, 1973.

FOR THE UNION:
ROAD SPRINKLER FITTERS
LOCAL UNION 669

/s/ By JOSEPH HAJKOWSKI
Joseph Hajkowski
President, Local 669
P.O. Box 773
7411 Riggs Road
Adelphi, Maryland 20783

FOR THE EMPLOYER:

.....
Name of Firm
/s/ By JAMES M. COLQUITT
James M. Colquitt
President

EXHIBIT 3 TO COMPLAINT

PAYMENT BOND
(*See Instructions*)

Date Bond Executed (*Must be same or later than date of contract*)—August 12, 1971

Principal (*legal name and business address*)—
J. W. Bateson Company, Inc. and Centex Corporation, a Joint Venture DBA J. W. Bateson Company, 10150 Monroe Drive, P.O. Box 20677, Dallas, TX 75220

Surety (ies) (*Names and business address*)—

The Aetna Casualty and Surety Company, Hartford, Conn.
American Re-Insurance Company, New York, New York
Employers Reinsurance Corporation, Kansas City, Mo.
General Reinsurance Corporation, New York, N.Y.
The Home Insurance Company, New York, N.Y.

Penal Sum of Bond: Millions—2; thousands—500; hundreds—000; cents—00.

Contract Date—August 10, 1971

Contract No.—GS-03B-15676 "NEG"

KNOW ALL MEN BY THESE PRESENTS, That we, the Principal and Surety(ies) hereto, are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally: *Provided,* That, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set

forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the Principal entered into the contract identified above;

NOW, THEREFORE, if the Principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the Surety(ies) being hereby waived, then the above obligation shall be void and of no effect.

IN WITNESS WHEREOF, the Principal and Surety(ies) have executed this payment bond and have affixed their seals on the date set forth above.

PRINCIPAL

/s/ JOHN A. WACKER,
John A. Wacker, President of
J. W. Bateson Company, Inc.
a member of the Joint Venture.

• • • •

INSTRUCTIONS

1. This form, for the protection of persons supplying labor and material, shall be used whenever a payment bond is required under the act of August 24, 1935, 49 Stat. 793, as amended (40 U.S.C. 270a-270e). There shall be no deviation from this form without approval by the Administrator of General Services.

2. The full legal name and business address of the Principal shall be inserted in the space designated "Principal" on the face of the form. The bond shall be signed by an authorized person. Where such person is signing in a representative capacity (e.g., an attorney-in-fact), but is not a

member of the firm, partnership, or joint venture, or an officer of the corporation involved, evidence of his authority must be furnished.

3. (a) Corporations executing the bond as sureties must be among those appearing on the Treasury Department's list of approved sureties and must be acting within the limitations set forth therein. Where more than a single corporate surety is involved, their names and addresses (city and State) shall be inserted in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)", and in the space designated "SURETY(IES)" on the face of this form only the letter identification of the Sureties shall be inserted.

(b) Where individual sureties execute the bond, they shall be two or more responsible persons. A completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. Such sureties may be required to furnish additional substantiating information concerning their assets and financial capability as the Government may require.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Seal"; and, if executed in Maine or New Hampshire, shall also affix an adhesive seal.

5. The name of each person signing this payment bond should be typed in the space provided.

• • • •

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Motion to Dismiss

Defendants, by counsel, move this Honorable Court to dismiss the Complaint filed heretofore by plaintiff for failure to state a cause of action, or, in the alternative, on the ground that this Court does not have jurisdiction over the subject matter, for the reasons set forth in the attached Memorandum of Points and Authorities.

ROTHWELL, CAPPELLO & BERNDTSON

By /s/ HENRY J. CAPPELLO
Henry J. Cappello
Attorney for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-699

UNITED STATES OF AMERICA for and on behalf of the BOARDS OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, et al., *Plaintiffs*

v.

J. W. BATESON COMPANY, INC., *Defendant*

(FILED JULY 3, 1974)

Order

Upon consideration of Defendant's Motion to Dismiss, the Opposition thereto, and the entire record herein, it appearing to the Court that the definition of a "subcontractor" as used in Section 270b(a) of the Miller Act, 40 U.S.C. § 270b(a), is a "functional rather than a technical definition," *F. D. Rich Co., Inc.* v. *United States*, —— U.S. ——, 42 U.S.L.W. 4783, 4785, and that it is the nature of the relationship of the parties which is therefore controlling rather than any lable such as "third-tier" or otherwise, and it further appearing that the relationship of the Colquitt Sprinkler Company to the J. W. Bateson Company herein was both substantial and important, and that Colquitt Sprinkler Company is therefore a subcontractor herein within the meaning of the Miller Act, now therefore, it is this 3rd day of July, 1974;

ORDERED that the Motion to Dismiss be and hereby is DENIED.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Motion to Reconsider Defendants' Motion to Dismiss, or in the Alternative, to Certify Decision for Interlocutory Appeal

Defendants, by counsel, move this Honorable Court to reconsider its decision set forth in its Order filed July 3, 1974 denying defendants' Motion to Dismiss, or in the alternative to certify said decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), for the reasons set forth in the attached Memorandum of Points and Authorities.

ROTHWELL, CAPPELLO & BERNDTSON

/s/ By HENRY J. CAPPELLO
Henry J. Cappello
Attorney for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Request No. 1 for Producton of Documents

Plaintiffs Boards of Trustees of the National Automatic Sprinkler Industry Pension Fund, the National Automatic Sprinkler Industry Welfare Fund, and the National Automatic Local 669, U.A. Educational Fund and Road Sprinkler Fitters Local Union No. 669, U.A. hereby request the Defendants to respond within thirty (30) days of the date of the Certificate of Service to the following request: That the Defendants on August 14, 1974, at 10:00 a.m. at 1912 Sunderland Place, N.W., Washington, D.C. 20036, or at another reasonable place agreed by the parties, produce and permit Plaintiffs to inspect and copy each of the following documents:

1. All copies of certified payroll statements submitted by Colquitt Sprinkler Company, Inc. to the Government Services Administration.

2. All other payroll statements or records which indicate the number of hours worked by each of Colquitt's employees on the Howard University Hospital Project being Contract No. 65-03-B-15676.

3. Contract No. 65-03-B-15676 between the United

States of America and J. W. Bateson Company, Inc. and Centrex Corporation, a Joint Venture, doing business as, J. W. Bateson Company.

Respectfully submitted,

O'DONOGHUE & O'DONOGHUE

/s/ By DONALD J. CAPUANO
Donald J. Capuano

/s/ GLEN V. WHITAKER
Glenn V. Whitaker
1912 Sunderland Place, N.W.
Washington, D.C. 20036
(202) 785-2237
Attorneys for Plaintiffs

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

Civil Action No. 74-699

UNITED STATES OF AMERICA for and on behalf of the BOARDS OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, et al., *Plaintiffs*

v.

J. W. BATESON COMPANY, et al., *Defendants*

FILED JULY 26, 1974

Order

Upon consideration of Defendants' Motion to Reconsider Defendants' Motion to Dismiss, Or in the Alternative, to Certify the Court's Order of July 3, 1974, for Interlocutory Appeal, and the entire record herein, it appearing that there is no legal or other basis for the Defendants' Motion to Reconsider, and it further appearing that an immediate appeal pursuant to 28 U.S.C. § 1292(b) is not warranted by the circumstances of this case, now therefore, it is this 26th day of July, 1974, by the United States District Court for the District of Columbia,

ORDERED that the Motion to Reconsider be and hereby is DENIED;

ORDERED that the Motion to Certify the Court's Order of July 3, 1974, for Appeal Pursuant to 28 U.S.C. § 1292(b) be and hereby is DENIED.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Answer

FIRST DEFENSE

The Complaint fails to state a claim against defendants upon which relief can be granted.

SECOND DEFENSE

The plaintiffs have no standing to bring this action under 40 U.S.C. §§ 270a and 270b, not being a "person having direct contractual relationship with a subcontractor" or a person with a "contractual relationship express or implied with the contractor furnishing the payment bond."

THIRD DEFENSE

The plaintiffs by failing to collect contributions required by terms of the collective bargaining agreement between Local 669 and Colquitt Sprinkler Company, Inc., within a reasonable time following wage payments to employees by Colquitt, are guilty of laches and are estopped to claim that defendants are responsible for making contributions which Colquitt was obligated to make to plaintiffs.

FOURTH DEFENSE

By terms of the Collective Bargaining Agreement, Article 23, (Complaint Exhibits 1 and 2) the contractor (Colquitt) was required to furnish a surety bond to guarantee payment of contributions required by the Agreement; proceeding against this bond and the surety thereon is the exclusive remedy of the plaintiffs under this Agreement. By failure to obtain the monthly deposit reports required by the Agreement, to exercise their authority to audit the

records, otherwise insure compliance with the provisions of the Collective Bargaining Agreement, and to proceed in a timely manner against the surety bond, plaintiffs are estopped to bring this action against innocent third parties having no contractual privity to plaintiffs and no duty to police disbursement of funds by Colquitt.

FIFTH DEFENSE

Plaintiffs having knowledge of Colquitt's defaults in making deposits, as required by the Collective Bargaining Agreement in essence authorized a loan to Colquitt of the moneys due, thereby exceeded their authority as Trustees and fiduciaries and therefore may be personally liable to the beneficiaries of said Trusts; defendants having no knowledge and not having acquiesced in said loan, have no liability to plaintiffs or said beneficiaries. Upon insolvency of Colquitt, the Trustees and their beneficiaries, became mere unsecured creditors of Colquitt and have waived any rights they might otherwise have had under the Miller Act. Their claim, if any, attaches only to such sums as may be due to Colquitt by the subcontractor with whom Colquitt contracted. No moneys are owed by Colquitt under this contract.

SIXTH DEFENSE

Defendants deny the allegations of paragraph 1.

Defendants admit the allegations of paragraphs 4, 5, 6, 7, 8, 9, and 10 of the Complaint. Defendants admit the allegations of paragraph 11, except that defendants deny that the payment bond was for the protection of *all* persons supplying labor and material". Defendants allege that they are without knowledge or information sufficient to form

a belief as to the truth of the allegations contained in paragraphs 2, 3, 12, 13 and 14 of the Complaint.

ROTHWELL, CAPPELLO & BERNDTSON

/s/ By HENRY J. CAPPELLO
Henry J. Cappello
Attorney for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Request for Admissions of Fact

Come now the Plaintiffs, by and through counsel, and hereby request that the Defendants admit or deny the truth of the following facts, pursuant to Rule 36, Federal Rules of Civil Procedure.

1. That William Brooks worked 22 hours for Colquitt at the Howard University Hospital Project at the wage rate of $9.50 per hour.

2. That William Brooks worked 32 hours for Colquitt at the Howard University Hospital Project at the wage rate of $9.65 per hour.

3. That Dalton Stowe worked 6 hours for Colquitt at the Howard University Hospital Project at the wage rate of $10.00 per hour.

4. That Dalton Stowe worked 45 hours for Colquitt at the Howard University Hospital Project at the wage rate of $10.15 per hour.

5. That James Brown worked 8 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.75 per hour.

6. That James Brown worked 8 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.90 per hour.

7. That Edward Cook worked 472 hours for Colquitt at the Howard University Hospital Project at the wage rate of $9.50 per hour.

8. That Edward Cook worked 432 hours for Colquitt at the Howard University Hospital Project at the wage rate of $9.65 per hour.

9. That Robert Farish worked 488 hours for Colquitt at the Howard University Hospital Project at the wage rate of $7.61 per hour.

10. That Robert Farish worked 120 hours for Colquitt at the Howard University Hospital Project at the wage rate of $7.74 per hour.

11. That Robert Farish worked 216 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.09 per hour.

12. That Thomas Hall worked 296 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.75 per hour.

13. That Robert Hartzell worked 464 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.83 per hour.

14. That Robert Hartzell worked 80 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.94 per hour.

15. That Robert Hartzell worked 248 hours for Colquitt at the Howard University Hospital Project at the wage rate of $7.21 per hour.

16. That James Martin worked 5 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.75 per hour.

17. That Jack Pickrel worked 480 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.75 per hour.

18. That Jack Pickrel worked 416 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.90 per hour.

19. That James Stone worked 14 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.56 per hour.

20. That James Stone worked 56 hours for Colquitt at the Howard University Project at the wage rate of $6.68 per hour.

21. That Clarence Sampson worked 16 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.75 per hour.

22. That Clarence Sampson worked 80 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.90 per hour.

23. That Roy Corvin worked 96 hours for Colquitt at the Howard University Project at the wage rate of $9.50 per hour.

24. That Roy Corvin worked 104 hours for Colquitt at the Howard University Hospital Project at the wage rate of $9.65 per hour.

25. That Larry Howe worked 88 hours for Colquitt at the Howard University Project at the wage rate of $6.04 per hour.

26. That Larry Howe worked 56 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.14 per hour.

27. That Larry Howe worked 40 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.41 per hour.

28. That Bryon Roshto worked 72 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.04 per hour.

29. That Bryon Roshto worked 48 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.14 per hour.

30. That H. B. Watson worked 16 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.94 per hour.

31. That H. B. Watson worked 256 hours for Colquitt at the Howard University Hospital Project at the wage rate of $7.21 per hour.

32. That Ronald Strobel worked 244 hours for Colquitt at the Howard University Hospital Project at the wage rate of $9.65 per hour.

33. That Warren Souder worked 20 hours for Colquitt at the Howard University Hospital Project at the wage rate of $7.21 per hour.

34. That Lowell Hatcher worked 8 hours for Colquitt at the Howard University Hospital Project at the wage rate of $9.65 per hour.

35. That the total number of hours worked by employees of Colquitt Sprinkler Company (who are represented for collective bargaining purposes by Local 669) on the Howard University Hospital Project, Contract No. 65-03-B-15676 is 5060 hours.

Respectfully submitted,

O'Donoghue & O'Donoghue

/s/ By Glenn V. Whitaker
Glenn V. Whitaker
1912 Sunderland Place, N.W.
Washington, D.C. 20036
785-2237

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Response to Plaintiffs' Request for Admissions of Fact

Defendants are unable to admit the truth of the facts set forth in Plaintiffs' "Request for Admissions of Fact" served October 30, 1974, because the information available to defendants consists almost entirely of records supplied by Colquitt Sprinkler Co., Inc. (Colquitt), which information or records may be inaccurate as to number of hours or the job on which work was performed by the indicated employees. Based on the amount of work completed at the time of Colquitt's insolvency in relation to claims for compensation made by Colquitt on account of labor and material supplied, there may be substantial discrepancies in these records.

/s/ HENRY J. CAPPELLO
Henry J. Cappello
Attorney for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Request for Admissions as to the Genuineness of Certain Documents

Come now the Plaintiffs, by and through counsel, and hereby request that the Defendants admit or deny that the following documents, exhibited with this request, are genuine to the extent that they are the Contractor's Weekly Payroll Statements submitted by Colquitt Sprinkler Company, Inc. to the General Services Administration and/or J. W. Bateson Company, Inc. and Centex Corporation, A Joint Venture, DBA J. W. Bateson Company, pursuant to Section 4 of Standard Form 19-A incorporated by reference into Construction Contract GS-03B-15676 "NEG":

No.—Date *Description*

1—May 2, 1973—Contractor's Weekly Payroll Statement
2—May 9, 1973—Contractor's Weekly Payroll Statement
3—May 16, 1973—Contractor's Weekly Payroll Statement
4—May 23, 1973—Contractor's Weekly Payroll Statement
5—May 30, 1973—Contractor's Weekly Payroll Statement
6—June 6, 1973—Contractor's Weekly Payroll Statement
7—June 13, 1973—Contractor's Weekly Payroll Statement
8—June 20, 1973—Contractor's Weekly Payroll Statement
9—June 27, 1973—Contractor's Weekly Payroll Statement
10—July 4, 1973—Contractor's Weekly Payroll Statement
11—July 11, 1973—Contractor's Weekly Payroll Statement
12—July 18, 1973—Contractor's Weekly Payroll Statement

13—July 25, 1973—Contractor's Weekly Payroll Statement
14—Aug. 1, 1973—Contractor's Weekly Payroll Statement
15—Aug. 8, 1973—Contractor's Weekly Payroll Statement
16—Aug. 15, 1973—Contractor's Weekly Payroll Statement
17—Aug. 22, 1973—Contractor's Weekly Payroll Statement
18—Aug. 29, 1973—Contractor's Weekly Payroll Statement
19—Sept. 5, 1973—Contractor's Weekly Payroll Statement
20—Sept. 12, 1973—Contractor's Weekly Payroll Statement
21—Sept. 19, 1973—Contractor's Weekly Payroll Statement
22—Sept. 26, 1973—Contractor's Weekly Payroll Statement
23—Oct. 3, 1973—Contractor's Weekly Payroll Statement
24—Oct. 10, 1973—Contractor's Weekly Payroll Statement
25—Oct. 17, 1973—Contractor's Weekly Payroll Statement
26—Oct. 24, 1973—Contractor's Weekly Payroll Statement

Respectfully submitted,

O'Donoghue & O'Donoghue

/s/ By Glenn V. Whitaker
Glenn V. Whitaker
1912 Sunderland Place, N.W.
Washington, D.C. 20036
785-2237
Attorneys for Plaintiffs

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Caption Omitted in Printing)

Defendants' Motion for Summary Judgment

Defendants, by counsel, move this Honorable Court to grant Summary Judgment against plaintiffs for the reasons set forth in the attached memorandum, in consideration of uncontroverted facts as set forth in the attached Statement of Material Facts as to Which There is No Genuine Issue and in consideration of the Affidavit of Lewis L. Pierce, attached hereto. Oral Argument Is Requested.

/s/ Henry J. Cappello
Henry J. Cappello
Attorney for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Affidavit

CITY OF ALEXANDRIA
STATE OF VIRGINIA, SS:

Comes now Lewis L. Pierce, and being duly sworn, deposes and says:

(1) I am President of Pierce Associates, Inc.

(2) Colquitt Sprinkler Company, Inc., (Colquitt) contracted with Pierce Associates, Inc. (Pierce) to provide materials for and installation of a sprinkler system in connection with an addition to Howard University Hospital as alleged in the Complaint herein.

(3) All sums due and owing to Colquitt from Pierce on account of work performed under said contract have been paid; moreover, because it was necessary for Pierce to complete work contracted for by Colquitt as a result of Colquitt's default, and because Colquitt has substantially overbilled the percentage of his work actually completed prior to his unilateral termination of performance, there is owing to Pierce from Colquitt a substantial sum of money chargeable to Colquitt's default and to said overbillings.

(4) There was no privity of contract between the prime contractor, J. W. Bateson Company, Inc., and Colquitt; all of Colquitt's dealings under said contract were directly with Pierce and no others.

(5) That it is the general understanding of contractors engaged in government construction contracting, as Pierce has been engaged for over 13 years, that the Miller Act bond runs to indemnify only persons who supply labor and material to the prime contractor, or to subcontractors in direct privity of contract with the prime contractor.

(6) Under the circumstances of this case, it was Pierce's understanding that it had no obligation to supervise the disbursal of funds paid to Colquitt, because persons dealing with Colquitt knew or should have known that the Miller Act bond would not protect them.

(7) If notified and requested by the plaintiffs' Pierce would have taken steps essential to protect the plaintiffs' entitlement to be paid from funds being paid by Pierce to Colquitt. The normal procedure in such cases would be to issue joint-payee checks to Colquitt and the plaintiffs. Such action, though not a legal obligation, is a common practice with Union contractors to protect their relationship with the building trade unions as a group, to assure continued furnishing of labor and to prevent periodic and disruptive stoppages of work.

(8) At no time prior to December 10, 1973, did Pierce receive notice, either directly or indirectly, that the sums claimed by plaintiffs herein had not been paid. Pierce assumed, in good faith, that all moneys due to employees of Colquitt were being paid when due, as evidenced by the local union continuing to supply men to Colquitt to perform this work. It is a matter of routine, amongst the various union trades in the construction industry, that the local unions withdraw their tradesmen from employers who default in payment of fringe benefits contractually required by the various collective bargaining agreements.

(9) Pierce was aware that Colquitt and plaintiffs had a "Collective Bargaining Agreement" between themselves, and understood, in conformance with common provisions of such agreements, that a surety bond was provided to insure that payment of fringe benefits and union dues would be made by the employer. Pierce was never advised either directly or indirectly prior to December 10, 1973, that plaintiffs had waived this bond in the case of Colquitt.

/s/ LEWIS L. PIERCE
Lewis L. Pierce

(JURAT OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Statement of Material Facts as to Which There is no Genuine Issue Supporting Defendants' Motion for Summary Judgment

1. There is no privity of contract between plaintiffs and defendants; the contract upon which plaintiffs rely to sustain this action was a "Collective Bargaining Agreement" between Colquitt Sprinkler Company, Inc. (Colquitt) and Road Sprinkler Fitters Local Union No. 669 U.A. (Complaint, para. 2).

2. Colquitt was a sub-subcontractor of Pierce Associates, Inc., subcontractor of J. W. Bateson Company, the prime contractor on a United States Government contract for construction of an addition to Howard University Hospital in the District of Columbia. (Complaint, para. 10, 12).

3. Under provisions of the "Collective Bargaining Agreement" Articles 4, 19, 20, 21, and 24, Colquitt was required to withhold from wages of employees represented by Local 669, certain sums for union dues, union welfare fund, union pension fund, union education fund, and employees vacation savings plan, respectively. (Complaint, para. 12).

4. Under provisions of the "Collective Bargaining Agreement", Article 4, "The employer [Colquitt] agrees to deduct Union Membership Dues . . . from the pay of each employee who executes . . . the . . . Check-Off . . . form. Such deductions shall be computed and deducted weekly and remitted to Local Union 669 monthly, not later than the 15th day of each month following the month in which the wages were paid." (Complaint, Exhibit 1 and 2, page 4).

5. Under provisions of Article 19 of the "Collective Bargaining Agreement", an Industry Welfare Fund is recognized together with a Board of Trustees to administer said Fund; the employer (Colquitt) agrees to pay to said Fund forty cent (fifty cents after April 1, 1974) for each hour worked for him by members of Local 699. (Complaint, Exhibits 1 and 2, page 18).

6. Under provisions of Article 20 of the "Collective Bargaining Agreement", an Industry Pension Fund is recognized, together with a Board of Trustees to administer said Fund; the employer (Colquitt) agrees to pay to said Fund sixty cents (seventy cents after April 1, 1974) for each hour worker for him by members of Local 669. (Complaint, Exhibits 1 and 2, p. 19).

7. Under provisions of Article 21 of the "Collective Bargaining Agreement", an Industry Education Fund is recognized, together with a Board of Trustees to administer said Fund; the employer (Colquitt) agrees to pay to said Fund seven cents (eight cents after April 1, 1974) for each hour worked for him by members of Local 669. (Complaint, Exhibits 1 and 2, p. 20).

8. Under provisions of Article 24 of the "Collective Bargaining Agreement" a Vacation Savings Plan is recognized, and the employer (Colquitt) agrees to withhold from Union members wages fifty cents for each hour worked and to deposit, with a designated bank for the individual employee's Vacation Savings Account, the amount of wages withheld, not later than the 15th of the month following the month in which the hours were worked. (Complaint, Exhibits 1 and 2, pages 22-24).

9. The Trustees of each of the Funds referred to in paragraphs 5-7 above, are identical. (Complaint, Caption.)

10. Under provisions of Article 20 of the "Collective Bargaining Agreement," each employer is required to submit contributions to the Welfare, Pension and Educational

Funds "in accordance with rules, regulations, and procedures established by the Trustees . . ." Also each employer "shall furnish to the Union a cash or surety bond in an amount not less than Five Thousand Dollars ($5,000.00) to guarantee contribution for Welfare, Pension, Education, Vacation and Dues in the manner and in the amount required by this Agreement." (Complaint, Exhibits 1 and 2, p. 21).

11. Under provisions of Article 25 of the "Collective Bargaining Agreement", failure to make payments or reports of fringe contributions due and payable gives the Union the right to remove employees from any job or jobs of the Employer or to take other economic action against the employer. (Complaint, Exhibits 1 and 2, pages 24-25).

12. No formal implementation was made of Article 22 of the "Collective Bargaining Agreement" insofar as "rules, regulations, and procedures" being established by the Trustees of the Welfare, Pension and Educational Funds; instead the Trustees "adopted a general guideline that when a contractor is more than two months delinquent in its fringe benefit payments the delinquency is referred to Fund Counsel for legal action." (Ans. Def. Interrogatory #3).

13. The administrator of the Union's Welfare, Education and Pension Funds, James H. Curry, was aware of Colquitt's failure to pay contributions and withholdings when due, i.e., the 15th of the month subsequent to the month for which payments are due. (Ans. Def. Interrogatory #4).

14. Local 699 did not require Colquitt to post a bond to guarantee payments of fringe benefits and union dues as required by Article 22 of the "Collective Bargaining Agreement", and failed to exercise its right to stop work under Article 25 of said Agreement. (Ans. Def. Interrogatories #5 and #7).

15. Plaintiffs were aware that Colquitt was not meeting its obligations to make fringe benefits and dues payments in June 1973, but did not notify Colquitt's contractor, Pierce Associates, Inc., of such non-payment at any time prior to December 10, 1973. The last work performed for Colquitt under the "Collective Bargaining Agreement" occurred on December 1, 1973. (Complaint, para. 14; Ans. Def. Interrogatories #4 and #9).

ROTHWELL, CAPPELLO & BERNDTSON

/s/ By HENRY J. CAPPELLO
Henry J. Cappello
Attorney for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Plaintiffs' Cross-Motion for Summary Judgment

COME Now the Plaintiffs, by and through their attorneys and hereby move this Honorable Court to grant Plaintiffs' Cross-Motion for Summary Judgment against the Defendants for the reasons set forth in the attached memorandum, in consideration of the attached Statement of Material Facts to which there is no genuine issue and in consideration of the Affidavit of Joseph Hajkowski, attached hereto.

Respectfully submitted,

O'DONOGHUE & O'DONOGHUE

/s/ By GLENN V. WHITAKER
Glenn V. Whitaker
1912 Sunderland Place, N.W.
Washington, D.C. 20036
785-2237
Attorneys for Plaintiffs

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Affidavit of Glenn V. Whitaker

DISTRICT OF COLUMBIA: ss

Glenn V. Whitaker, being first duly sworn on oath, deposes and states:

1. That he is counsel for the Plaintiffs in the above captioned case.

2. That on or about December 10, 1973, he notified the Defendant, J. W. Bateson Company, by letter of the Plaintiffs' claim on the payment bond furnished by Bateson pursuant to the provisions of the Miller Act, 40 U.S.C. § 270b(a). The return receipt and letter from Bateson acknowledging receipt of the notice are attached.

/s/ GLEN V. WHITAKER
Glenn V. Whitaker

(JURAT OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Affidavit of Joseph Hajkowski

DISTRICT OF COLUMBIA: ss

Joseph Hajkowski, being first duly sworn on oath, deposes and states:

1. That the affiant is Chairman of the Boards of Trustees of the National Automatic Sprinkler Industry Pension Fund, the National Automatic Sprinkler Industry Welfare Fund and the National Automatic Sprinkler Local 669, U.A. Educational Fund located at P.O. Box 1925, Silver Spring, Maryland 20902. The Trustees of the Funds are as follows:

National Automatic Sprinkler Industry Pension Fund

Joseph Hajkowski, Thomas W. Hanna,
Thomas J. Devlin — Union Trustees

Raymond J. Casey, Richard D. Sullivan
Maurice Bernier — Employer Trustees

National Automatic Sprinkler Industry Welfare Fund

Joseph Hajkowski, Thomas W. Hanna
Clyde C. Cleare — Union Trustees

Raymond J. Casey, Richard D. Sullivan
Maurice Bernier — Employer Trustees

National Automatic Sprinkler Local 669,
U.A. Educational Fund

Joseph Hajkowski, Thomas W. Hanna
Kenneth G. Hollaway — Union Trustees

Raymond J. Casey, Richard D. Sullivan
Maurice Bernier — Employer Trustees

Mr. Raymond J. Casey is Co-Chairman of the three Funds.

2. That the affiant is President of Road Sprinkler Fitters Local Union No. 669, U.A. (hereinafter "Local 669") located at 7411 Riggs Road, Adelphi, Maryland 20783. Local 669 is an unincorporated labor organization representing sprinkler fitters employed by sprinkler contractors throughout the United States.

3. That the National Automatic Sprinkler Industry Pension Fund, the National Automatic Sprinkler Industry Welfare Fund and the National Automatic Sprinkler Local 669, U.A. Educational Fund (hereinafter "Sprinkler Funds") are employee fringe benefit trust funds established for the benefit of employees represented by Local 669 pursuant to Articles 19, 20, and 21 of the collective bargaining agreement between the National Automatic Sprinkler and Fire Control Association (hereinafter the "Association") and Local 669.

4. That Colquitt Sprinkler Company, Inc. (hereinafter "Colquitt") is a party to the collective bargaining agreement referred to above. Because Colquitt is not a member of the Association, it was necessary for Colquitt to sign separately in order to be bound by the provisions of the agreement between the Association and Local 669. (A copy of the agreement and signed assent is attached to the Complaint as Exhibit 1 and 2.)

5. That pursuant to Articles 19, 20 and 21 of its collective bargaining agreement with Local 669, Colquitt was required effective April 1, 1973, to pay for each of its employees represented by Local 669, $0.40 per hour to the N.A.S.I. Welfare Fund, $0.60 per hour to the N.A.S.I. Pension Fund, and $0.07 per hour to the N.A.S. Local 669, U.A. Educational Fund; that pursuant to Article 24 of the

collective bargaining agreement with Local 669, Colquitt was required to withhold from the wages of each of its employees represented by Local 669 the sum of $0.50 per hour for each hour worked by its employees and submit this withheld money to a Vacation Fund maintained by the Riggs National Bank; that pursuant to Article 4 of the collective bargaining agreement with Local 669, Colquitt was required to withhold from the wages of each of its employees represented by Local 669 who executed an "Authorization for Check-Off of Work Assessment" form, union membership dues in the amount of 1½% of the employee's gross wages and to forward this money to Road Sprinkler Fitters Local Union No. 669.

6. That during the period May 1, 1973 through October 1973, several persons represented by Local 669 were regularly employed by Colquitt at the Howard University Hospital job site and were engaged at Colquitt's special instance and request in the installation of a fire sprinkler system in the hospital building.

7. That the general contractor on the Howard University Hospital building was J. W. Bateson Company, and it was Local 669's understanding that Colquitt was one of many subcontractors employed on the job doing work which was an integral part of the contract between the General Services Administration and J. W. Bateson Company.

8. That during the period May 1, 1973 through October, 1973 [in late October, 1973, the last of the labor was performed on the Howard University Hospital job by employees of Colquitt who were represented by Local 669], Colquitt failed to make any payments to the Sprinkler Funds or to forward to Local 669 or the Riggs National Bank any monies withheld from the wages of its employees who worked many hours on the Howard University Hospital project at Colquitt's special instance and request.

9. That during the period May 1, 1973 through October, 1973, Colquitt failed to make payments to the Sprinkler Funds or forward to Local 669 or the Riggs National Bank monies withheld from the wages of its employees even though Colquitt had in its employ several persons represented by Local 669 who worked many hours on a variety of jobs throughout the Washington metropolitan area (other than and in addition to the Howard University Hospital project).

10. That pursuant to the provisions of Article 22 of the collective bargaining agreement between the Association and Local 669 (to which Colquitt is a party), the Trustees of the Welfare, Pension and Educational Funds are permitted to institute and participate in legal proceedings to collect payments or contributions from an employer which has not made such payments on time. That Article 22 also states that any employer which is a party to the collective bargaining agreement shall furnish to the Union a cash or surety bond in an amount not less than $5,000.00 to guarantee payments to the Sprinkler Funds and vacation and dues payments.

11. That Article 25 of the agreement excludes from the grievance procedure and arbitration, a violation of the agreement by an employer involving his failure to pay or report fringe contributions due and payable under the agreement. That Local 669 has the right "to remove employees from any job or jobs of the Employer or to take other legal economic action against the Employer" when a violation such as that described above has occurred.

12. That Articles 22 and 25 of the collective bargaining agreement are not intended either expressly or impliedly to waive any of the statutory or other legal rights of those persons represented by Local 669 and the Trustees of the Sprinkler Funds in the present law suit. That no authorized agent of Local 669 or any Trustee or agent of the Sprinkler Funds has signed any waiver or expressed any intention to

anyone to sign or agree to a waiver of the statutory or other legal rights of the persons who are represented by Local 669 and the Trustees of the Sprinkler Funds in the present law suit. That the surety bond and the right to strike provided for in Articles 22 and 25 are merely additional security measures designed to avoid the necessity of legal action to collect unpaid monies. That enforcement or non-enforcement of the surety bond provision in Article 22 and implementation or non-implementation of the right to strike in Article 25 do not in any way affect an employer's obligations under the collective bargaining agreement to make payments to the Sprinkler Funds and to forward to Local 669 and the Riggs National Bank monies withheld from employees' wages. That Article 22 specifically refers to the Trustees' right to institute legal proceedings to collect from an employer monies owed to the Sprinkler Funds.

13. That the bond and right to strike provisions contained in Articles 22 and 25 were not included in the collective bargaining agreement as a recognition by Local 669 or the Association that the Miller Act would not cover persons like those on whose behalf the present action was instituted. That the bond and right to strike provisions were as previously stated, included in the agreement as additional security measures to insure that employers would comply with their financial obligations under the agreement.

14. That Colquitt has been a party to several agreements with Local 669 during the past years and Colquitt has always been able to pay wages and fringe benefits to its employees without problems. That Colquitt made repeated promises to pay during the period of its delinquency which were initially honored by the Trustees and Local 669 because of Colquitt's reasonably good record as an employer. That Colquitt's delinquency was not discovered by the Sprinkler Funds and Local 669 until late June, 1973, and

pursuant to the Trustees' general rule that delinquencies are allowed to run for two months before being referred to legal counsel for collection, no decision was made with respect to Colquitt's delinquency until late July or early August, 1973. That legal action was delayed because of Colquitt's repeated promises to pay.

14. That the surety bond provision contained in Article 22 of the collective bargaining agreement was a new provision which had never before been a part of the agreements to which the Association or Colquitt were parties. That neither Local 669 nor the Association (which negotiated the agreement) expected that the bond provision could be implemented immediately with respect to every employer member of the Association or every independent employer like Colquitt. That employers experienced problems with obtaining bonding companies which were willing to write the bonds and that these problems caused delay.

15. That when Local 669 obtained Colquitt's signature on the assent to be bound by the terms of the collective bargaining agreement, the Local did not immediately press Colquitt to post a cash or surety bond. That the employment situation in the Washington metropolitan area was very bad during 1973 and that Local 669 was more interested in signing Colquitt and insuring that Colquitt's employees who were represented by Local 669 could remain employed than the Local was interested in requiring Colquitt to implement the bond provision. That in any event, Local 669 recognized that it would take some time after Colquitt was signed to the agreement before Colquitt could obtain a bond.

16. That when Local 669 later decided to press Colquitt for a bond, it was obvious that Colquitt's financial situation was such that it would be impossible for Colquitt to issue a cash bond or to obtain a bond from any bonding company. That Local 669 did not at any time expressly or

impliedly waive implementation of the bond provision with respect to Colquitt.

17. That the Trustees of the Sprinkler Funds and/or Local 669 did not at any time agree to notify any of the Defendants or Pierce Associates, Inc. with respect to any delinquency in Colquitt's payments to the various Funds and the Local.

/s/ JOSEPH HAJKOWSKI
Joseph Hajkowski

(JURAT OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Plaintiffs' Statement of Material Facts

1. Road Sprinkler Fitters Local Union No. 669, U.A. (hereinafter "Local 669"), located at 7411 Riggs Road, Adelphi, Maryland 20783 is an unincorporated labor organization representing sprinkler fitters employed by sprinkler contractors throughout the United States (Affidavit of Mr. Joseph Hajkowski, ¶ 2).

2. The National Automatic Sprinkler Industry Pension Fund, the National Automatic Sprinkler Industry Welfare Fund and the National Automatic Sprinkler Local 669, U.A. Educational Fund (hereinafter "Sprinkler Funds") are employee fringe benefit trust funds established for the benefit of employees represented by Local 669 pursuant to Articles 19, 20, and 21 of the collective bargaining agreement between the National Automatic Sprinkler and Fire Control Association (hereinafter the "Association") and Local 669 (Affidavit of Joseph Hajkowski, ¶ 3).

3. Colquitt Sprinkler Company, Inc. (hereinafter "Colquitt") is a party to the collective bargaining agreement referred to above. Because Colquitt is not a member of the Association, it was necessary for Colquitt to sign separately in order to be bound by the provisions of the agreement between the Association and Local 669 (Affidavit of Joseph Hajkowski, ¶ 4).

4. Pursuant to Articles 19, 20, and 21 of its collective bargaining agreement with Local 669, Colquitt was required effective April 1, 1973, to pay for each of its employees represented by Local 669, $0.40 per hour to the N.A.S.I. Welfare Fund, $0.60 per hour to the N.A.S.I. Pension Fund, and $0.07 per hour to the N.A.S. Local 669,

U.A. Educational Fund; pursuant to Article 24 of the collective bargaining agreement with Local 669, Colquitt was required to withhold from the wages of each of its employees represented by Local 669 the sum of $0.50 per hour for each hour worked by its employees and submit this withheld money to a Vacation Fund maintained by the Riggs National Bank; pursuant to Article 4 of the collective bargaining agreement with Local 669, Colquitt was required to withhold from the wages of each of its employees represented by Local 669 who executed an "Authorization for Check-Off of Work Assessment" form, union membership dues in the amount of 1½% of the employee's gross wages and to forward this money to Road Sprinkler Fitters Local Union No. 669 (Affidavit of Joseph Hajkowski, ¶ 5).

5. During the period May 1, 1973 through October, 1973, several persons represented by Local 669 were regularly employed by Colquitt at the Howard University Hospital project job site and were engaged at Colquitt's special instance and request in the installation of a fire sprinkler system in the hospital building (Affidavit of Joseph Hajkowski, ¶ 6).

6. The Howard University Hospital project was a federal project on which the J. W. Bateson Company was the prime or general contractor. On or about August 10, 1971, Bateson entered into a written contract with the United States, acting by and through the General Services Administration for the construction of an addition to the Howard University Hospital, being Contract No. G5-03-B-150676 (Answer of Defendants—Sixth Defense).

7. On August 12, 1971, Bateson along with the Defendant sureties, duly executed and delivered to the United States Government a payment bond for the protection of all persons supplying labor and materials in the prosecution of the work provided for in Contract No. G5-03-B-15676; the bond was duly executed in accordance with the

provisions of Title 40 of the United States Code, Section 270a in the sum of $2,500,000.00 (Answer of Defendants—Sixth Defense; 40 U.S.C. § 270a).

8. Colquitt was a subcontractor on the Howard University Hospital project and was engaged in the supply of materials for and the installation of a fire sprinkler system, work which was specifically required by and was an integral part of Contract No. G5-03-B-15676 between Bateson and the General Services Administration (Affidavit of Joseph Hajkowski, ¶ 7; Order of July 3, 1974; Section 1551 of Contract No. G5-03-B-15676 supplied by the Defendants).

9. During the period May 1, 1973 through October, 1973 Colquitt failed to make any payments to the Sprinkler Funds or to forward to Local 669 or the Riggs National Bank any monies withheld from the wages of its employees who worked many hours on the Howard University Hospital project at Colquitt's special instance and request (Affidavit of Joseph Hajkowski, ¶ 9).

10. During the period May 1, 1973 through October, 1973, Colquitt failed to make payments to the Sprinkler Funds or forward to Local 669 or the Riggs National Bank monies withheld from the wages of its employees even though Colquitt had in its employ several persons represented by Local 669 who worked many hours on a variety of jobs throughout the Washington metropolitan area (other than and in addition to the Howard University Hospital project). (Affidavit of Joseph Hajkowski, ¶ 9).

11. Pursuant to the provisions of Article 22 of the collective bargaining agreement between the Association and Local 669 (to which Colquitt is a party), the Trustees of the Welfare, Pension and Educational Funds are permitted to institute and participate in legal proceedings to collect payments or contributions from an employer which has not made such payments on time. Article 22 also states that any employer which is a party to the collective bar-

gaining agreement shall furnish to the Union a cash or surety bond in an amount not less than $5,000.00 to guarantee payments to the Sprinkler Funds and vacation and dues payments (Affidavit of Joseph Hajkowski, ¶ 10).

12. Article 25 of the agreement excludes from the grievance procedure and arbitration, a violation of the agreement by an employer involving his failure to pay or report fringe contributions due and payable under the agreement. Local 669 has the right "to remove employees from any job or jobs of the Employer or to take other legal economic action against the Employer" when a violation such as that described above has occurred (Affidavit of Joseph Hajkowski, ¶ 11).

13. Articles 22 and 25 of the collective bargaining agreement are not intended either expressly or impliedly to waive any of the statutory or other legal rights of those persons represented by Local 669 and the Trustees of the Sprinkler Funds in the present law suit. No authorized agent of Local 669 or any Trustee or agent of the Sprinkler Funds has signed any waiver or expressed any intention to anyone to sign or agree to a waiver of the statutory or other legal rights of the persons who are represented by Local 669 and the Trustees of the Sprinkler Funds in the present law suit. The surety bond and the right to strike provided for in Articles 22 and 25 are merely additional security measures designed to avoid the necessity of legal action to collect unpaid monies. Enforcement or non-enforcement of the surety bond provision in Article 22 and implementation or non-implementation of the right to strike in Article 25 do not in any way affect an employer's obligations under the collective bargaining agreement to make payments to the Sprinkler Funds and to forward to Local 669 and the Riggs National Bank monies withheld from employees' wages. Article 22 specifically refers to the Trustees' right to institute legal proceedings to collect

from an employer monies owed to the Sprinkler Funds (Affidavit of Joseph Hajkowski, ¶ 12).

14. The bond and right to strike provisions contained in Articles 22 and 25 were not included in the collective bargaining agreement as a recognition by Local 669 or the Association that the Miller Act would not cover persons like those on whose behalf the present action was instituted. The bond and right to strike provisions were, as previously stated, included in the agreement as additional security measures to insure that employers would comply with their financial obligations under the agreement (Affidavit of Joseph Hajkowski, ¶ 13).

15. The surety bond provision contained in Article 22 of the collective bargaining agreement was a new provision which had never before been a part of the agreements to which the Association or Colquitt were parties. Neither Local 669 nor the Association (which negotiated the agreement) expected that the bond provision could be implemented immediately with respect to every employer member of the Association or every independent employer like Colquitt. Employers experienced problems with obtaining bonding companies which were willing to write the bonds, and these problems caused delay (Affidavit of Joseph Hajkowski, ¶ 14).

16. The Trustees of the Sprinkler Funds and/or Local 669 did not at any time agree to notify any of the Defendants or Pierce Associates, Inc. with respect to any delinquency in Colquitt's payments to the various Funds and the Local (Affidavit of Joseph Hajkowski, ¶ 17).

17. On or about December 10, 1974, the Defendants were served with statutory notice of the Plaintiffs' claim against the Miller Act payment bond issued by Bateson and its sureties (Affidavit of Glenn V. Whitaker).

For its response to the Defendants' Statement of Material Facts, the Plaintiffs state as follows:

1. Privity of contract as referred to in paragraph 1 of Defendants' statement of facts is immaterial to the present action.

2. Defendants' reference to Colquitt as a "sub-subcontractor" in paragraph 2 of their statement of facts is immaterial in that the Court has ruled on two occasions that Colquitt was a "subcontractor" within the meaning of the Miller Act.

3. Defendants' claim in paragraph 9 of their statement of facts that the Trustees of the various Funds are identical is incorrect (Affidavit of Joseph Hajkowski, ¶ 1).

4. Paragraph 12 of the Defendants' statement of material facts is irrelevant and immaterial.

5. Paragraph 13 of the Defendants' statement of material facts is irrelevant and immaterial.

6. Paragraph 14 of the Defendants' statement of material facts is irrelevant and immaterial.

7. The first sentence of Paragraph 15 of the Defendants' statement of material facts is irrelevant and immaterial.

Respectfully submitted,

O'Donoghue & O'Donoghue

/s/ By Glenn V. Whitaker
Glenn V. Whitaker
1912 Sunderland Place, N.W.
Washington, D.C. 20036
785-2237
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-699

THE BOARDS OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, et al.,
Plaintiffs

v.

J. W. BATESON COMPANY, et al., *Defendants*

(FILED JUNE 6, 1975)

Order

Upon consideration of the Defendants' motion for summary judgment, the attached memorandum and affidavit and the Plaintiffs' cross-motion for summary judgment, the attached memorandum and affidavit, it is hereby ORDERED this 6th day of June, 1975, that:

1. The Defendants' motion for summary judgment be denied; and

2. The Plaintiffs' cross-motion for summary judgment be granted.

/s/ AUBREY E. ROBINSON, JR.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Notice of Appeal

Notice is hereby given that J. W. Bateson Company, Inc. and Centex Corporation, a Joint Venture, d/b/a J. W. Bateson Company, The Aetna Casualty and Surety Company, American Re-Insurance Company, Employers Re-Insurance Corporation, General Reinsurance Corporation and The Home Insurance Company, defendants hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the Order denying defendants' motion for summary judgment and granting plaintiffs' cross-motion for summary judgment, entered in this action on the 6th day of June, 1975.

ROTHWELL, CAPPELLO & BERNDTSON

/s/ By HENRY J. CAPPELLO
Henry J. Cappello
Attorney for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(CAPTION OMITTED IN PRINTING)

Motion to Dismiss Appeal

COME Now the Plaintiffs-Appellees Boards of Trustees of the National Automatic Sprinkler Industry Pension Fund, the National Automatic Sprinkler Industry Welfare Fund, the National Automatic Sprinkler Local 669, U.A. Educational Fund, and Road Sprinkler Fitters Local Union No. 669, U.A., by and through their attorneys, and hereby move this Court to dismiss the appeal in the above-captioned case on the ground that the appeal is not within the jurisdiction of this Court because the order sought to be reviewed is neither a final judgment under 28 U.S.C. § 1291 nor an appealable interlocutory order under 28 U.S.C. § 1292.

Respectfully submitted,

O'DONOGHUE & O'DONOGHUE

/s/ By GLENN V. WHITAKER
Glenn V. Whitaker
1912 Sunderland Place, N.W.
Washington, D.C. 20036
785-2237

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

No. 75-1761

UNITED STATES OF AMERICA, et al.

v.

J. W. BATESON COMPANY, INC., et al.

BEFORE: McGowan and Leventhal, Circuit Judges

(FILED OCTOBER 24, 1975)

Order

On consideration of appellee's unopposed motion to dismiss appeal, it is

ORDERED by the Court that the aforesaid motion is granted and this appeal is dismissed.

The Clerk is directed to transmit a certified copy of this order to the District Court as promptly as the business of this office permits.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Motion to Certify for Appeal Pursuant to 28 U.S.C. 1291-1292

Defendants, by counsel, with the concurrence of plaintiffs, hereby move this Honorable Court to certify this case for interlocutory appeal pursuant to 28 U.S.C. §§ 1291-1292 for the reasons set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted,

ROTHWELL, CAPPELLO & BERNDTSON

/s/ By HENRY J. CAPPELLO
Henry J. Cappello
Attorneys for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

SEEN AND APPROVED:

O'DONOGHUE & O'DONOGHUE

/s/ By GLENN V. WHITAKER
Glenn V. Whitaker
Attorney for Defendants
1912 Sunderland Place, N.W.
Washington, D.C. 20036
785-2237

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-699

UNITED STATES OF AMERICA for and on behalf of the BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY WELFARE FUND, et al., *Plaintiffs*

v.

J. W. BATESON COMPANY, et al., *Defendants*

(FILED OCTOBER 29, 1975)

Order

Upon Motion of defendants, concurred in by plaintiffs, and it appearing to the Court that the determination of the Court heretofore granting Summary Judgment to plaintiff involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation, it is by the Court this 29th day of October, 1975,

ORDERED, ADJUDGED AND DECREED that this matter be, and the same hereby is, certified for appeal to the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. §§ 1291-1292, and the proceedings herein are stayed pending determination of said Appeal.

/s/ AUBREY E. ROBINSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Notice of Appeal

Notice is hereby given that J. W. Bateson Company, Inc. and Centex Corporation, a Joint Venture d/b/a J. W. Bateson Company, The Aetna Casualty and Surety Company, American Re-Insurance Company, Employers Re-Insurance Company, defendants, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the Order denying defendants' motion for summary judgment and granting plaintiffs' cross-motion for summary judgment, entered in this action on the 6th day of June, 1975.

This case was certified for appeal pursuant to 28 U.S.C. §§ 1291-1292 by this Court on October 29, 1975, by United States District Judge Aubrey E. Robinson, Jr.

ROTHWELL, CAPPELLO & BERNDTSON

/s/ By HENRY J. CAPPELLO
Henry J. Cappello
Attorneys for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

Civil 74-699
No. 75-2199

UNITED STATES OF AMERICA for and on behalf of the BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, et al.

v.

J. W. BATESON COMPANY, INC., et al., *Appellants*

Appeal from the United States District Court
for the District of Columbia.

BEFORE: Wright and Robb, Circuit Judges and Gesell,* United States District Judge for the District Court for the District of Columbia.

(FILED JANUARY 28, 1977)

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.[1]

Per Curiam
FOR THE COURT:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date: January 28, 1977
Opinion for the Court filed by District Judge Gesell.
Concurring opinion filed by Circuit Judge Wright.

[1] The opinion of the Court of Appeals and concurring opinion are printed in full in the petition for writ of certiorari file herein.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

Civil 74-699
No. 75-2199

UNITED STATES OF AMERICA, et al.

v.

J. W. BATESON COMPANY, INC., and
CENTEX CORP., et al., *Appellants*

BEFORE: Wright and Robb, Circuit Judges; and Gesell,* United States District Judge for the United States District Court for the District of Columbia.

(FILED FEBRUARY 16, 1977)

Order

On consideration of the petition for rehearing filed by appellants, it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Per Curiam
FOR THE COURT:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

Civil 74-699
No. 75-2199

UNITED STATES OF AMERICA, et al.

v.

J. W. BATESON COMPANY, INC., and
CENTEX CORP., et al., *Appellants*

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

(FILED FEBRUARY 16, 1977)

Order

The suggestion for rehearing *en banc* filed by appellants having been transmitted to the full Court, and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court, *en banc*, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

SUPREME COURT OF THE UNITED STATES

No. 76-1476

J. W. BATESON COMPANY, INC., et al., *Petitioners,*

v.

UNITED STATES EX REL. BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, et al.

ORDER ALLOWING CERTIORARI.

Filed June 27, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.